

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CAROL DUNSEITH</b>	:	<b>ORDER</b>
		<b>DTA NO. 820609</b>
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2002.	:	

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Petitioner, Carol Dunseith, 29 Rozel Road, SW4 OEY, London, United Kingdom, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2002.

On July 20, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On August 10, 2005 each of the parties were given until September 19, 2005 to submit their responses or any additional information. On August 19, 2005, petitioner submitted correspondence with attachments in opposition to a dismissal. On September 14, 2005, the Division of Taxation by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this Order commenced September 19, 2005. After due consideration of the documents and arguments submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

***FINDINGS OF FACT***

1. Petitioner, Carol Dunseith, filed a timely request for a conciliation conference, dated June 10, 2004, with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-023874583-6. Petitioner’s request for a conciliation conference listed the following as her address:

41 Bramfield Road  
London, SW11 6RA  
UK

2. Petitioner’s request also listed the name and address of her representative as follows:

Kathleen McDermott  
Pricewaterhouse Coopers LLP  
300 Atlantic St.  
Stanford, CT 06901

The request was signed by petitioner’s representative and dated June 10, 2004.

3. Petitioner’s conciliation conference was scheduled for November 16, 2004. However, her representative received the notice the day after the conference, November 17, 2004, and consequently failed to appear. Petitioner’s representative immediately contacted the conferee by telephone leaving voice mails in order to apprise him of the situation.

4. BCMS issued a Conciliation Default Order to petitioner, dated November 26, 2004, which denied petitioner’s request and sustained the Notice of Deficiency.

5. On or about December 13, 2004, petitioner’s representative wrote a letter to the conciliation conferee which stated, in pertinent part:

We are writing on behalf of the above named [sic] taxpayer in response to your notice dated November 26, 2004 (a copy enclosed).

Please note that we were unable to attend to the Conciliation Conference as we did not receive the Notice of the Conciliation Conference until after November 16, 2004. We ask that [a] new date be scheduled, at which time we will have an opportunity to appear and present the case on behalf of the above named [sic] taxpayer.

6. On May 17, 2005, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Default Order dated November 26, 2005.

7. On July 20, 2005, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice indicates that the Conciliation Default Order was issued on November 26, 2004 but that the petition was not filed until May 17, 2005 which is beyond the time permitted.

8. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted, among other things, a copy of petitioner's Request for Conciliation Conference, a copy of the Registered Record for Non-Presort Foreign Address Mail ("RMR") showing the conciliation order allegedly issued by the Division on November 26, 2004 and a copy of the subject November 26, 2004 Conciliation Default Order.

9. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services ("BCMS"), sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders which are sent outside of the United States by United States Postal Service ("USPS") registered mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the RMR.

10. The RMR attached to Mr. Farley's affidavit is a true and accurate copy of the RMR for the conciliation order issued by BCMS on November 26, 2004 to Carol Dunseith. The procedures followed on November 26, 2004 were the normal and regular procedures of BCMS on November 26, 2004.

11. No mailing information was provided with respect to petitioner's representative.

#### ***SUMMARY OF THE DIVISION'S POSITION***

12. The Division submits that it has submitted proof that the conciliation order was mailed to petitioner on November 26, 2004 at her address of record. It further submits that the petition to the Division of Tax Appeals was filed on May 17, 2005, as shown by the date on the envelope in which it was mailed, while the conciliation order was mailed on November 26, 2004. The Division also maintains that the conciliation default order was mailed to and received by petitioner's representative as evidenced by her letter to the conciliation conferee dated December 13, 2004. On the basis of these assertions, the Division surmises that the petition was untimely filed and the Division of Tax Appeals lacks jurisdiction.

#### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b) the conciliation order in this case and the underlying Notice of Deficiency would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the requisite time limit (*see, e.g., Matter of Casessa*, Tax Appeals Tribunal, May 29, 1997). Here, since the notice was addressed to a person residing outside of the United States, petitioner had 150 days after the mailing of the notice of deficiency to file a petition with the Division of Tax Appeals (Tax Law § 689[b]).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). In order to establish the date of mailing, the evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales and Service*, Tax Appeals Tribunal, May 23, 1991). The Division has failed to meet this burden.

C. Here, the Division presented evidence of its procedure for the mailing of conciliation orders and evidence that its procedures were followed with respect to the mailing of the conciliation order to petitioner. However, it is unnecessary to address the adequacy of the evidence which has been offered because it is readily evident that the Division's evidence is deficient with respect to its mailing to petitioner's representative. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43

NY2d 168, 401 NYS2d 29). Here, the Division has not argued that it was not on notice that petitioner had a representative. Rather, the Division merely asserts that the conciliation default order was mailed to and received by petitioner's representative as evidenced by her letter to the conciliation conferee dated December 13, 2004. Clearly, petitioner's representative acquired a copy of the notice by December 13, 2004. However, the Division's argument is deficient for at least two reasons. First, it fails to recognize that it is equally plausible that the Division never mailed the notice to petitioner's representative. That is, it is possible that the representative acquired the notice from petitioner. Second, the argument does not begin to meet the requirement that the Division show that it has a procedure for mailing notices to a taxpayer's representative and that the procedure was followed in this case. Accordingly, it is concluded that the Division has not established that it mailed the notice to petitioner's representative.

Therefore, the time period for filing a petition is tolled and the petition is timely.

D. The Notice of Intent to Dismiss Petition dated July 20, 2005 is withdrawn.

DATED: Troy, New York  
November 17, 2005

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE